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No.

In The

Supreme Court of the Unite States

October Term, 1996

SHIRLEY DURST-LEE

Petitioner

vs.

MERIT SYSTEMS PROTECTION BOARD

Respondent

Pettion for a Writ of Ceritorari to the Nnited States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

SHIRLEY DURST-LEE
P. O. Box 67391
Topeka,Kansas,66667
(913) 271-5978S

30 PP

QUESTION(S) PRESENTED

1. How is it possible to terminate someone without t he protocol of reprimands/

2..Why did all the hearings only hear managements' side/

3. Probationary Period was served overseas. /Why was it not honored by Ft. Riley/

4. Why was I fired for doing Mary Sneidre's work/

5. Why wasn't I ever given any encourgement for anything I did right/

6. The cases sighted apply to both Mary Sneider and me.. Yet action was only taken against me.

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APPENDIX

Appendix A Judgement with opinion of the united states court of appeal for the Federal Circuit filed Nov. 12, 1996a

Appendix B Decision of the United States Court of Appeals for the Federal Circuit decided Nov. 12,1996

Appendix C order of the United States court of Appeals for the Federal Circuit ordered August 30,1996

Appendix D Initial Decision fo the United States Merit Systems Protection Board Denver Field Office decided Jan. 11,1996

Appendix E Facts and Conclusions of the Equal Employment opportunity Commission St. Louis Distriict office Date 8 August 1995.-

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at the Federal Circuit

The opinion of the United States district court appears at Appendix A to the petition and is reported at United States Merit Systems Protection board

The date on which the United States Court of Appeals decided my case was November 12,1996

STATEMENT OF JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5C.F.R. 315.806
5 U.S. § 7703 a 2)
Spruill v. Merit Systems Protection Board., 978 F2d 679,686
(Fed Cir 1992
Hayes v. Department of the Navy, 272 F2d. 1535,1537 (Fed. Cir 2984)
5 U.S.C. § 7703 (1994)

STATEMENT OF CASE

Joan Goins initiated a termination and was successful. Testimonies by coworkers (mine) were entered and accepted as truth about issues I was never questioned about. Joan never asked me about the lesson plan form, my side of any verbal altercation that may have taken, and gave direction ONLY after a mistake was made. The Director I spoke with was Cindy not Lorna. Lorna did whatever Joan told her to do. As an Education Program Specialist I was supposed to check the work of the Program Assistants. It was not my job to any Program Assistant duties. I have thirteen certificates which Joan signed to give to the Program Assistants. Six of these certificates were one year old when they were awarded by me.

Vitto and Joan were obviously at war with each other. I went to Vitto the day the thirty day letter expired. Telling him that and bringing a file for him to view, to see the work I had done. He went to Joan talk to Joan. I was told to talk to Joan. It was at that time I was given my discharge papers and told

to "clean out my desk". I also went to talk with an EEO Officer when Joan issued the clarification memo. EEO never made an attempt to have the two of us resolve any issues. No evidence exist showing Mary Seidner "was going to be terminated

> "With regard to Complainants' claim that Mary Seidner (white Female) was also not performing the normal job requirements, yet was not discharged like Complainant; the record reveals that Ms. Seidner as indeed going to be terminated for poor performance but, resigned in lieu of termination on June 6, 1992. Ms. Seidner was treated no differently than Complainant."

No evidence was given to prove Mary Seidner was going to be terminated.

I was never afforded the privilege of a conversation with Joan unless I was being reprimanded. If management was managing the Center? Why is it I was singled out for filing a complaint for being mismanaged and or mistreated it.

I worked two overseas, in a career conditional position. A one year probationary period was required. I completed my probationary period with the Department of the Army in 1990.

REASONS FOR GRANTING THE PETITION

This complaint has gone on because, all levels of the process heard only what they wanted to hear. The facts have always been present. These are the facts.

Fact: I completed thirteen certificates, Joan signed.
FACT: I also did all the other task assigned to me
Fact: I had to redo Mary Seidner's work.
Fact: Probation was served overseas.
Fact: Joan's information was based on hearsay.
Fact: The thirty day letter expired.

CONCLUSION

The petition for writ of certiorari should be granted because; the agency never offered a fair settlement.

Respectfully submitted,
Shirley A. Durst-Lee
7 Feb. 1997

APPENDIX A-JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED NOVEMBER 12, 1996

PRESENT: HONORABLE MAYER
Circuit Judge
HONORABLE ALAN D. LOURIE
Circuit Judge
HONORABLE RADER
Circuit Judge

SHIRLEY A. DURST-LEE

Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD

Respondent

Shirley Durst-Lee petitions for review of the decision of the Merit Systems Protection Board, No. CH315H960504-1-1 (June11, 1996),

dismissing, for lack of jurisdiction, the appeal of the termination as a Child Development Specialist with the Department of the Army. Durst-Lee did not file a petition for the board's review of the initial decision, which became final on July 16, 1996. We affirm

Shirley Durst-Lee challenges he board's determination that she neither completed her probationary period nor non-frivolously alleged either partisan political or marital status discrimination. In reviewing a board decision we apply a narrow, statutory standard. See Hayes v. Department of the navy, 727F.2d 1535,1537 (Fed. Cir.1984). We must affirm a board decision unless a petitioner demonstrates that it is (1) arbitrary, capricious, an abuse of discretion, or other wise not in accordance with the law; (2) obtained without adherence to procedures required by law, rule, or regulation; or (3) unsupported by substantial evidence. 5 U.S.C §7703

[a](c) (1994). Durst-Lee has not met this burden. Accordingly, as a probationary employee, she is not entitled to appeal her removal.

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pursuant to Fed. Cir 476, this disposition is not citable as precedent. It is not a public record. The disposition will appear in tables published periodically.

APPENDIX B-JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ORDERED AUGUST 30, 1996

96-3337

PRESENT: HONORABLE LOURIE
Circuit Judge

SHIRLEY DURST-LEE

Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD

Respondent

ON MOTION

Lourie, Circuit Judge

ORDER

The Department of the Army moves to reform the caption to designate the Merit Systems Protection Board as respondent. The Army states that Shirley Durst-Lee and the Board consent.

Durst-Lee was a probationary employee when her employment was terminated for misconduct and unacceptable performance. As a probationer, Durst-Lee has a limited right to appeal the Army's personnel action. For example, a probationary employee who is terminated due to conditions arising after appointment may appeal to the Board only if he /she alleges that the termination was based on partisan political reasons or marital status. 5 C.F.R. § 315.806. Shirley, Durst-Lee contendee before the Board that the Army terminated her because of partisan reason and marital status. The Board concluded, however, that Durst-Lee "vague claim of discrimination is insufficient to constitute a non-frivolous allegation of jurisdiction".

Pursuant to 5 C.F.R. § 7703 (a) (2), the Board is designated as the respondent when its decision concerns solely the procedure or jurisdiction of the Board. Spruill v. Merit Systems protection Board., 978 F. 2d 679,686 (Fed. Cir. 1993) The Agency is designated as the respondent when the Board reaches the merits of the underlying personnel action. ld

In this case, the board concluded that it did not have jurisdiction over Durst-Lee's appeal, determining that Durst-Lee contention that her termi-

nation was based on partisan political reasons and marital status was "no nonfrivolous". This was not a decision on the merits. The board, therefore, is the proper respondent in this petition for review.

Pursuant to Fed. Cir R. 476, this order is no citable as precedent. It is a public order.

APPENDIX C - JUDGMENT OF THE UNITED STATES OF AMERICA SYSTEMS PROTECTION BOARD DENVER FIELD OFFICE JUNE 11, 1996

PRESENT: HONORABLE ELIZABETH D. MILLIGAN
Administrative Judge

SHIRLEY DURST-LEE

Appellant

v.

DEPARTMENT OF THE ARMY

Agency

Ch-315H-96-0504-I-1

INITIAL DECISION

The appellant filed an appeal of the agency's decision to terminate her from her position a Child Development Education Specialist, GS-7, during her probationary period. For the reasons discussed below, I dismiss this appeal for lack of appellate jurisdiction.

Analysis and Findings

An employee may file an appeal with the board from actions which are appealable to the board under any law, rule , or regulation. 5 U.S.C. § 7701 (a). The appellant bears the burden of proving by preponderant

Evidence that her claim is within the jurisdiction of the board. See 5 CFR § 1201.56 (a) (2) (i). The statutory right of appeal for nonprobationary employees who have been subjected to an adverse action is set forth in 5 USC §7511-7513. Excluded from coverage are employees in the competitive service who have not completed a probationary period. However, 5 CFR Part 3 15H (1995) sets out certain regulatory appeal rights for probationary employees. When terminated for alleged post-appointment reasons the Board had jurisdiction if the probationary employee can show that she was terminated because of partisan 4a political or marital status discrimination. 5 CFR § 315.806;

see Strokes v. Federal Aviation Administration, 761 F.2d 682, 684 085 (/ Fed. Cir. 1985).

Additionally, if the termination was based on matters which occurred before her appointment, she may appeal on the grounds that the action violated the procedures stated in 5C. F.R. § 315.805.

It is undisputed that the appellant was in the competitive service and that she was terminated for post appointment reasons, alleged misconduct and unacceptable performance. Thus, the only issues for resolution are: 1) whether the appellant was serving a probationary period and 2) if so, has she raised the necessary nonfrivolous allegation of either partisan political or marital status discrimination.

Upon review of the record, I find that the appellant was hired on March 30, 1992, to the position in question, and terminated on July 24, 1992. Clearly, she was terminated during her first year of employment unless her prior service in the overseas excepted service position should be included or " tacked" to the time she was employed in the career-conditional position prior to her termination. The appellant provided a Standard Form (SF) 50 showing that she was reassigned, while employed in the overseas excepted service position, under the authority of "Sc h A 213.3106 (B) (6)." AF, TAB 11. In unrebutted evidence, the agency has shown that such local hire appointments of former overseas employees with indefinite tenure are not credible towards the completion of a probationary period .AF, TAB 13 (Regulations showing content of SCh A 213. 3106 (B) (6). After reviewing the evidence in this case, I find that the appellant's prior service in the excepted service overseas positions is not credible toward completion of the career -conditional probationary period. See 5 C.F. R. § 315. 801 (5) and 315. 802 (a). Accordingly, the appellant was serving a probationary period upon her termination.

In addition, a non-frivolous allegation of discrimination based on partisan political reasons or marital status must be supported by factual assertions indicating that the allegations are not merely pro forma. See Phillip s v. Department of Housing and Urban Development, 44 MS P R. 48, 53 (1990). In this case, the appellant's claim of partisan political discrimination does not relate to political maters at all. AF Tab 11. Further, the appellant's allegations of marital status discrimination consist only of her statement that she was the only person on the Spousal Preference List and that her supervisor did not want to hire her. Nothing in the file suggests that the supervisor does not hire married women, etc.,

only that the supervisor did not want to hire the appellant. The appellant's vague claim of discrimination is insufficient to constitute a non-frivolous discrimination is insufficient to constitute a non-frivolous allegation of jurisdiction. See Ellison v. Merit Systems Protection Board, 7 F3d 1031, 1035-36 (Fed. Cir. 1993) (neither the mere recitation of a basis for jurisdiction nor vague and incomplete statements provide a basis for jurisdiction).

Further , I fine that the appellant has failed to raise a non- frivolous allegation of jurisdiction sufficient to warrant a hearing. Bell v. United States Postal Service, 6 M S P R 32, 34-35 (1994) (non-frivolous allegation of Board jurisdiction entitles appellant to a hearing on the jurisdiction question).

The appeal is dismissed. 16 June 96

E.M./Elizabeth D. Milligan
Administrative Judge

APPENDIX D -EQUAL EMPLOYMNT OPPORTUNITY COMMISSION ST. LOUIS DISTRICT OFFICE-FACTS AND FINDINGS OF LAW IN THE DISCRIMINATION COMPLAINT OF

SHIRLEY A. LEE

Complainnant

EEOC Case No. 280-93-4180X;

agency No 93-12-0102

Togo D. West, Secretary of the Army

Tatjana v. Schwendinger
administrative Judge 8 aug 95
Equal Employment Opportunity Commission
St. Louis District Office
625 North Euclid, 5th Florr
St. Louis, Missouri, 63108

I. Introduction:

Pursuant to Section 1614.109 of .he Commission's regulations a hearing was conducted by Administrative Judge Yollander Hardaway on August 23, 1993, at Fort Riley, Kansas. The hearing was reconvened by Administrative Judge Emily Rice on November 18,1994 via a video teleconference for the purpose of taking additional testimony. The hearing involved the discrimination complaint filed by Shirley A. Lee, hereinafter referred to as Complainant, formerly a Child Development Education Program Specialist at the Child Development Services Branch of the United States Army, Fort Riley, Kansas, hereinafter referred to as Agency.

Complainant charges that she was discriminated against based on her race (black) and/or reprisal (prior EEO activity) when she was terminated from her position as a GS-7 Child Development Program Specialist, during her probationary period, on or around July 24, 1992. Complainant maintains that she was inadequately trained and not given proper guidance or time to cultivate the skills of her position.

At the hearing, five witnesses testified including: Complainant; Rhononda Plummer, Vitto Trezza; Joan Goins; and Lorna Ford. Ten exhibits were admitted into the record. Also of record are the investigative file, the complaint processing documents, and the closing arguments of the parties. As a result of the untimely December 4, 1994 death of Judge Rice, these Finding of Facts and Conclusions of Law are bring issued by the undersigned by agreement of the parties.

II Finding of Fact:

a. Administrative Procedural Background:

An July 28, 1992. Complainant went to an EEO counselor alleging race discrimination (black) and/ or reprisal (prior EEO activity) when she was terminated from her position during her one-year probationary period. Counseling concluded on October r2, 1992, without resolution and on October 15, 1992, Complainant filed a formal EEO complaint alleging race discrimination and/or reprisal in her discharge. The complaint was investigated on December 21, 1992 via a fact-finding USACARA hearing.

b. Factual Background:

Complainant began her employment with the Agency as a Child

Development Program Specialist at the Child Development Center in Fort Riley, Kansas (hereinafter "the Center") on March 30,1992. (Investigative Exhibit 10). The Complainant was placed in the position through a career conditional appointment, subject to the completion of a one-year probationary period and was selected because she was entitled to "spouse preference." (Investigative Exhibit 10). Although "spousal preference" is not defined in the record, it appears that the term meant that Ms. Joan Goins (white female), Complainant's direct supervisor, was required to hire the complainant based upon the fact that Complainant was the spouse of a military person who had been transferred to Ft. Riley. When Complainant began her employment, she informed Ms. Goins that she had filed an EEO Complaint against another facility in the Agency located in Germany.

The primary responsibility of a Child Development Program Specialist is training the employees (also referred to as "caregivers") who care for infants, toddlers, and preschool children in the development of children, child abuse prevention, and other related matters pertinent to these age groups. (Investigative Exhibit11; Hearing Transcript, August 1993,p. 20). In association with the training, a child development Education Program Specialist overseas the evaluation of the employees' lesson plans, organizes field trips and outside visitors for the children field trips and outside visitors for the children and generally is available as a resource for identifying and suggesting age appropriate activities and toys. (Investigative Exhibit 11). When Complainant was hired, Mary Seidner and Kim Dimel were the other Child Development Program Specialists at the Fort Riley Center who shared educational supervision of the Complainant's arrival, Ms. Seidner resigned. The caregivers first line supervisor was the Assistant Director of the Center who reported to the Director of the Center. Ms. Goins reported to Vitto Trezza, a white male, who was the chief of the Family Support Division.

Complainant was oriented to her job during the first two weeks of employment and was not assigned to any caregivers. (Hearing Transcript, August 1993, p. 43). During that time, Ms. Goins provide d Complainant with job descriptions, performance standards, and several written directions for job procedures. She also reviewed job-related subjects and expectations with Complainant including: file organization; timeliness;; trainer's guide; developmental philosophy; parent handbook; and education specialist handbook. (Investigative Exhibit 11). Ms. Goins provided Complainant with her assignment in writing, through Mr. Trezza, on April, 1992. ID

Ms. Goins testified that Complainant, as soon as she began working, told the Director what was wrong with the Child Development Center and began giving instructions to caregivers that contravened Center policy. (Hearing Transcript August 1993, p. 43; Investigative Exhibit 11).

Beginning on April 29, 1992, Ms. Goins gave Complainant written notes or memoranda regarding her job performance, as follows:

April 29, 1992: Notes describing corrections that needed to be a made to the documentation in files;

May 14, 1992: Notes describing corrections that needed to be made to the documentation in files;

June 3, 1992: Note questioning Complainant's proposed trip to the zoo file organization; timeliness;; trainer's guide; developmental philosophy; parent handbook; and education specialist handbook. (Investigative Exhibit 11). Ms. Goins provided Complainant with her assignment in writing, through Mr. Trezza, on April 1 , 1992. ID Ms. Goins testified that Complainant, as soon as she began working, told the Director what was wrong with the Child Development C enter and began giving instructions to caregivers that contravened Center policy. (Hearing Transcript August 1993, p. 43; Investigative Exhibit 11).

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May 14, 1992 Notes describing corrections that needed to be made to the documentation in files;

June 3, 1992: Note questioning Complainant's proposed trip to the zoo approach to caregivers; lesson plans;

June 16, 1992: Memorandum about Complainant giving more than one training module to caregivers at a time;

June 18, 1992; Memorandum, Unacceptable Job Performance , through Mr. Trezza, describing Complainant's performance problems, advising her that she was not meeting performance requirements in the area, of training, evaluation, and documentation of training given, Coordinating special events relating to staff in professional manner and ensuring that records were complete and providing Complainant with thirty days to improve or be discharged.;

JUNE 23, 1992 notes criticizing Complainant's documentation, use of forms, organizing evaluation of training and training assigned to program assistants (caregivers).

JULY 10, 1992; Written criticisms of the training schedules for caregivers and documentation of training.

On July 24, 1992, Ms. Goins gave Complainant a Notice of Discharge effective July 25, 1992. (Investigative Exhibit 12). The Notice of Discharge was initialed by Mr. Trezza.

III. Conclusions of Law

In the precedential case of McDonnell Douglas Corporation v. Green, 411 Ü.S. 792 (1973), the United States Supreme Court sought to "Clarify the standards governing the disposition of an action challenging employment discrimination" or discriminatory employment treatment in the single plaintiff context. Evaluation of the evidence in a case of alleged discriminatory treatment generally involves a three- stage process, as delineated by the Supreme Court in McDonnell Douglas, and a number of landmark cases expounding on the analytical principles of that case. See Texas Department of Community Affairs v. Burdine, 450 U. S. 1089 (1981); Teamsters v. United States, 431 U.S. 324 (1977) ; United States Postal Service v. Aikens, 460 U.S. 711 (1983). McDonnell Douglas, supra, at 802, 804; Burdine, supra. See also, Hicks v. St. Mary's Honor Center, 1 13 S. CT. 2742 (1993).

First, it must be determined whether the complainant has established, by a preponderance of the evidence, a prima facie case of employment discrimination; that is, facts sufficient to establish a legally mandatory presumption that the employer discriminated, or that the employer's action was based on an impermissible factor.

Second, if the complainant has established a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the action.

Third, should it be found that the employer met this burden, it must then be determined whether the complainant proved, by a preponderance of the evidence, that the reasons offered by the employer were not its true reasons, but rather were a pretext for discrimination or a cover-up for a decision based on an illegal factor. McDonnell Douglas, supra, at 802, 804; Burdine, supra. See also, Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742 (1993).

The ultimate burden of proving that the employer intentionally discriminated remains at all times with the complainant. This does not mean that the employee must establish willful discrimination for motive may be inferred from circumstances such as differences in treatment, but the complainant must ultimately prove discriminatory motivation by the

preponderance of the evidence of record in order to prevail. Burdine, supra; Board of Trustees of Keene State College v. Sweeney, 439 U.S. 25, n.2 (1979); Teamsters, supra.

In the instant case, in order to establish a prima facie case of discriminatory discharge during her probationary period, Complainant must show: (1) that she is a member of a protected group under Title VII; (2) that she was satisfying the normal requirements of her position and was discharged while others similarly situated but not of her protected group who were also not satisfying the normal requirements of their positions were retained. Mills v. Ford Motor Co., 800 F 2d 635,638 (6th Cir. 1986); Thompkins v. Morris Brown College, 752 F3d 558, 562 (11th Cir. 1985); Eduardo Hernandez v. United States Postal Service, EEOC 90-01903636. I conclude that Complainant has failed to establish the third prong of the prima facie case because Complainant failed to show either that she satisfied the normal requirements of her position or that others similarly situated but no of her protected group were treated differently.

The record reveals that Complainant failed to follow instructions and standard operating procedures; continually made errors in her work; ignored constructive feedback on how to improve her performance; and failed to cooperate as a team player with co-workers. Complainant, for example, ignored standard operating procedures when organizing a field trip to the zoo. The standard operating procedures specifically discussed how a trip was to be organized including factors such as how many teachers or education specialists were needed to supervise and how many children may attend. The outline Complainant prepare and submitted for approval to Ms. Goins was returned to Complainant with instructions to redo in compliance with the Center's regulations. When Complainant resubmitted a second zoo field trip outline, the outline continued to diverge from the Center's policies an field trips.

Goins also testified that Complainant did not abide by the Centers policy regarding outside visitors. The Center's policy required that the Program Director and CDS coordinator must approve all special visitors and guests to the Center. While Ms. Goins was on leave, Complainant brought in two guest speakers without the approval of the Acting Director or Coordinator, and without the approval of any other management personnel. Ms. Goins testified that Complainant did not respond well to the feedback goins provided to Complainant on this issue and displayed an attitude of "wanting to do her own thing" and "in her own way" to the detriment of the Center and was not interested in being a team player or working with others.

Ms. Goins testified that Complainant's uncooperative attitude was also displayed in the area of lesson plans. In order to obtain accreditation, the Center had developed standard lesson plans on printed forms. Complainant refused to use the daily forms saying it "was too much work" and took it upon herself to develop her own form without approval from any management personnel and told others to use her form rather than the form approved by the Center. Ms. Goins also testified that Complainant often did not check or prepare lesson plans as required by Center policy.

The testimony of Ms. Goins as to Complainant's performance problems and uncooperative attitude is factually supported and corroborated both by written notes and memoranda and by the testimony of Lorna Ford (white female), the Director of the Center, and the statements by Ms. Kim Dimel (white female), a co-worker of Complainant, and Ms. Teresa Griffin (white female), an Education Technician trained by Complainant.

Lorna Ford testified that Complainant was "determined to implement what she thought was appropriate in the classrooms," wanted only "to do things her own way," and was "domineering" and "intimidating." Ms. Ford further testified that, although she told Complainant how to prepare, and substantively what needed to be included, in a memorandum that was to be submitted prior to brining outside visitors into the Center so as to be in compliance with Center policy, Complainant did not always follow the established procedure. For example, Complainant scheduled a firefighter and a police officer to speak with children at the Center even though Ms. Ford had not been made aware of their visitations or given approval to Complainant as required by the Center's policy. Ms. Ford also testified that Complainant did not follow established procedure in implementing training modules. For example, Ms. Ford stated that there were times when she would find an employee under Complainant's jurisdiction working on four training modules at one time despite the policy that employees were to work only on one module at a time until ready to advance to another training module. Ms. Ford four training modules at one time despite the policy the policy that employees were to work only on one module at a time until read to advance to another training module. Ms. Ford also testified that, regarding Complainant's improper planning of a zoo field trip, Complainant did not leave adequate time for all the children to have permission slips signed, and all of the children's files were not updated and organized to include necessary emergency medical cards in the event a child was injured while on the trip.

The record shows that Ms. Kim Dimel, Complainant's coworker and fellow Child Development Education Program Specialist, also provided

testimony regarding Complainant's poor attitude and failure to follow instructions and regulations. Ms. Dimel stated the, because Complainant failed to update the children's files prior to the scheduled zoo filed trip, Dimel and others had to take care of seeing that the files were updated and organized properly. Dimel also reveled that she observed Complainant using the wrong formats for the classroom, and that Complainant continued to do so even after Dimel informed Complainant that she was using improper formats. In short, Ms. Dimel stated that Complainant "would be told something and then not follow through with it."

I note that Complainant asserted that Ms. Dimel's testimony should not be credited because she was under the supervision of Ms. Goins and was thus predisposed to testify on her behalf and in favor of the Agency. To the contrary, the evidence showed that, at the time Ms. Dimel gave testimony during the Agency's investigatory fact-finding USACARA hearing, she was no longer employed by the agency and had no motivation to skew her testimony in favor of Ms. Goins or the Agency .

The record also reflects that Ms. Teresa Griffin, an Education Technician trained by Complainant, observed that Complainant did not follow directions from the staff members and ignored several policies of the Center. For example, Ms. Griffin stated that, after Complainant was discharged from the Center, Griffin realized that Complainant had not recorded a great deal of Griffin's training in her file as required by Center policy, and as a result, Ms. Griffin had to redo training that had previously been completed under Complainant's supervision.

Complainant argue that any performance problems she may have exhibited were due to the fact that she was inadequately trained and not given proper guidance or time to develop the skills necessary to successfully perform in her position as child Development Education Program Specialist. However, Ms. Goins testified and supplied supporting documents which showed that complainant did receive formal training during the first two weeks of her employment and continued informal feedback thereafter. On Complainant's first day of employment ,Ms. Goins provided her with an orientation as to what was involved in the position of education specialist. Ms. Goins discussed with Complainant how to document files, reviewed with Complainant the Center's standard operating procedures, regulations, and training guide, and oriented Complainant to the work facilities. Over the next several weeks Ms. Goins issued the Complainant five policy and guidance statements to assist her in the performance of her duties. On April 2, 1992, Complainant received a written program assignment, and a week later she was given a performance

plan for her particular position. The written training documents that Ms. Goins had with Complainant regarding job responsibilities. Moreover, Complainant did not offer any evidence that others not of Complainants race received any more training, guidance, feedback, or orientation than that provided to Complainant.

Complainant was also given substantial advice and counseling regarding performance in her position. Ms. Goins provided her with feedback on April 29, 1992, and on May 14, 1992. Ms. Goins also gave Complainant additional instruction regarding the center's safety policy on June 3, 1992, along with written instructions pertaining to "clocking in and out" policies, the policy with respect to outside visitors, and the training documentation procedures. Complainant received other instructions, feedback and in informal notice that she was not progressing favorably in her position on June 8,15, and 16, 1992. Thus, the record reveals that Complainant was provided with ample opportunity to take advantage of both verbal and written guidance and to ask questions if any areas of concern or confusion existed.

Complainant also argues that a previous Child Education Program Specialist, Mary Seinder (white female), left her files incomplete, that Ms. Seidner's performance was poor but yet she was not discharged, that Complainant was unfairly criticized for some occurrences that were the result of her being force to take over Ms. Seidner's case files which were in poor condition; that Kim Dimel was treated more favorably than Complainant when she brought up suggestions or expressed her opinion to Ms. Gions; and that Complainant did not have any problems relating to staff members other tan Ms. Goins.

The evidence of record refutes these contentions. First, the evidence showed that generally, Complainant was not treated any differently than her white counterpart, Kim Dimel. For example, when it came to receiving Ms. Seidner's old files, Ms. Goins distributed the files equally between Complainant and Kim Dimel, the other Education Program Specialist during the relevant time period. Ms. Goins testified that she recognized that some of Seidner's files were not in "good shape", but that she took this into consideration and made appropriate allowances when assigning and reviewing Complainant's work. Knowing that some of the files Complainant inherited from Seidner needed special attention and that Complainant was a new employee, Ms. Goins took extra time to instruct Ms. Goins took extra time to instruct Complainant on documentation of files and inspected the files in order to provide Complainant with ample feedback on how to correct the files. The testimony form several disinterested witnesses showed that, in

many cases, Complainant refused to accept Ms. Gions feedback and did not correct the files.

As to Complainant's assertion that Kim Dimel was treated more favorably by Ms. Goins when making suggestions for improvement or expressing her opinion, the record showed that Complainant and Kim Dimel were not similarly situated in this respect. That is Complainant and Ms. Dimel were not similarly situated with regard to the deference Ms. Goins was entitled to give their suggestions for improvement in the management of the Center because Dimel had been employed in Complainant's position for four years. Dimel was a well established and experienced status employee, whereas complainant was a new probationary employee. It is not unlawful for employees who are not similarly situated to receive different treatment.

The evidence also contradicts Complainants's testimony that she did not have any problems relating to staff other than Ms. Goins. As discussed supra, Kim Dimel, Teresa Griffin, and Lorna Ford also testified as to problems they encountered with Complainant's performance and how Complainant's failure to follow established Center policies and procedures adversely affected them and created extra work for them.

With regard to Complainant's claim that Mary Seidner (white female) was also not performing the normal job requirements yet was not discharged like Complainant, the record reveals that Ms. Seidner was indeed going to be terminated for poor performance but resigned in lieu of termination on June 6, 1992. Ms. Seidner was treated no differently that Complainant., she was not retained.

In support of her claim of racial discrimination, Complainant also highlights the testimony of Vito Trezza (white male), who was Chief of Family Support Division and Ms. Goins' immediate supervisor. Trezza voluntarily contacted and EEO investigator regarding Complainant's charges of discrimination. Trezza testified at hearing that Ms. Goins disciplined Complainant for minor mistakes that were overlooked for others, that Goins repeatedly stated that she would get rid of Complainant, and that on many occasions goins referenced the fact that "Complainant was black."

Both a review of the record and close examination of the circumstances surrounding Trezza's testimony demonstrate that Trezza's Testimony regarding this matter is highly incredible. The evidence presented shows that, after Complainant was discharged, a sexual harassment complaint was filed against Trezza by Ms. Goins and was pending at the time Trezza voluntarily contacted the EEO investigator assigned to investigate Complainant's case. Ms. Goins' complaint resulted in an investigation into Trezza's conduct and an ultimate

finding by the investigator that Trezza was indeed guilty of sexual harassment. Subsequently, management proposed that Trezza be removed from his position. The order of removal was eventually reduced to a fourteen day suspension without pay, and Trezza was ultimately transferred to a position outside Fort Riley. Trezza arbors significant hostility toward Ms. Goins since his career was adversely affected by Goins' sexual harassment charges, and consequently Trezza possesses a strong motive to disingenuously accuse Goins of unlawful treatment of employees.

The credibility of Trezza's testimony is further weakened by the fact that, although he testified that he did not agree with Complainant's discharge and believe it was wrongful, Trezza himself read and signed or initialed the various documents and memoranda sent by Ms. Goins to Complainant regarding Complainant's unacceptable job performance and her ultimate discharge. As Ms. Goins' supervisor, Trezza had not only the Authority but the affirmative obligation to intercede if he believed Goins was discriminating against Complainant for race based reasons. It is undisputed that Trezza was aware of all actions taken by Ms. Goins with respect to Complainant during Complainant's employment with the Center. Rather than taking corrective measures to cure any alleged discrimination Trezza perceived was occurring, Trezza signed or initialed the various notices sent by Ms. Goins to Complainant regarding Complainant's failure to follow instructions and procedures, and Trezza ultimately signed Complainant's unacceptable job performance notice and discharge notice. Trezza's testimony that he only signed or initialed the various writings to show his acknowledgment of the actions, rather than his approval, is factually unsupported. As Ms. Goins' supervisor, had trezza truly believed Ms. Goins was engaging in race discrimination against Complainant, Trezza would no have signed or initialed Complainant's discharge documents.

Futhermore, the testimony form others, disinterested witnesses directly contradicts Trezza's testimony and shows that Ms. goins treated Complainant the same as other employees not of Complainant's race, and that Complainant's own behavior was the cause of her termination. Lorna Ford specifically described Complainant's conduct as domineering and uncooperative."

Regarding her reprisal (prior EEO activity) allegation Complainant bears the burden of establishing a prima facie case of discrimination by presenting evidence which shows: (1) that she is either engaged in opposition to Title VII discrimination or discrimination proscribed by other Federal law or participated in a discrimination proceeding; (2) that Complainant received adverse treatment from the employer either contemporaneous with or shortly after the opposition or participation; (3) that there is evidence of a causal connection between the basis and the issue, that is that a retaliatory motive

played a part in adverse treatment. Wren v, Gould, 808 F2d 493, 500 (6th Cir. 1984); Grant v. Bethlehem Steel Corp,, 622 F2d 43, 46 (2nd Cir.1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp 318 324 (D. Mass), aff'd, 545 F.2d 222 (1st Cir. 1976). If the Complainant meets this burden, the agency must articulate a legitimate, non-retaliatory reason for the adverse treatment. The complainant then bears the final burden of proving that the reason is pretext for retaliation or reprisal.

I conclude that Complainant presented on facts sufficient for a prima facie case of reprisal. She showed that she had engaged in prior EEO activity and that Ms. Goins knew of her prior activity. However, Complainant showed nothing which would raise an inference that in the natural sequence of events, Complainant would have been discharged during her one-year probationary period even absent known-of prior EEO activity. In fact, the documentation contained in the record and the testimony of all disinterested witnesses at both the USACARA hearing and the hearing conducted by the Administrative Judge clearly show that Complainant's discharge was based upon her poor job performance, not her EEO Activity. Complainant's assertion that her discharge was the result of reprisal is supported only by the testimony of Mr. Trezza, which as discussed supra, is highly incredible. 1

I emphasize that, while the Center may not have been the most well-run office, the particular system and criteria used by Ms. Goins and other supervisory personnel to manage the employees at the Center affected blacks as well as whites and in the same way.

These criteria were not shown as unrelated to the duties and responsibilities of Complainant's job of Child Development Education Program Specialist and were not demonstrated to be discriminatory in themselves. Complainant disagreed with many of the rules in place at the ?Center and chose not to function in accordance with these policies. Complainant, However, was required to follow her supervisor's rules and guidance where Complainant as an employee of the Center. While the Center where complainant was employed may not have been well-managed, no objective evidence was presented that the criteria and system used to supervise, train and evaluate employees at the Center was disparately applied on an unlawful basis to the employees in any way.

In summary, I conclude that Complainant did not establish a prima facie case of either race discrimination or reprisal, and therefore, the remaining steps of the McDonnell Douglas-Burdine analysis need not be addressed. The Agency should issue a decision finding no discrimination or reprisal.

END OF DOCUMENT

Tatjana V. Schwendinger, Administrative Judge

APPENDIX E - PROVISION AND STATUES INVOLVED

315,804 Termination of probations for unsatisfactory performance or conduct.

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his service by notifying him in writing as to why he is being separated and the effective date of the action. The information is the notice shall as a minimum, consists of the agency's conclusions of his performance or conduct.

315.805 Termination of probationer for conditions arising before appointment.

When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment the employee is entitled to the following:

(a) Notice of proposed adverse action the employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action. Specifically and in detail, for the proposed action.

(b) Employee's answer . The employee is entitled to a reasonable timing for filing a written answer to the notice of proposed adverse action and/or furnishing affidavits in support of his answer. If the employer answers the agency shall consider the answer in reaching its decisions.

5 C§ F§ R § 315.806 (a) (c)

(a) Right of Appeal. An employee may appeal to the Merit Systems Protection Board in writing an Agency's decision to terminate him under § 315.904 or 315.805 only as provided in paragraphs (b) and (c) of this section, the Merit Systems Protection Board review is confined to the issues in paragraphs (b) and (c) of this section.

(b) on discrimination. An employee may appeal under this paragraph a termination not required by statue which he or she alleges was based on partisan political reasons or marital status.

(c) On Improper procedures. A probationer whose termination is subject to 315.805 may appeal on the grounds that his termination was not effected in accordance with the procedural requirement of that section.

Loyce E. Hayes, Petitioner,
v.
Department of the Navy, Respondent.
Appeal NO. 83-1210.
United States Court of Appeals,
Federal Circuit.
Feb. 9, 1984.

Former Naval employee appealed from order of the Merit systems Protection Board affirming decision sustaining employee's discharge by the Department of Navy from position of mechanical planner-estimator. The Court of Appeals, Bennett, Circuit Judge, held that: (1) employee was not denied procedural and substantive due process on ground notice for his removal misstated date of his alleged improper and felonious conduct; (2) agency's deciding official demonstrated by preponderance of evidence required connection between former employee's job-related responsibilities and offense of assault and battery former employee's job-related responsibilities and offense of assault and battery on ten-year- old child; and (3) agency action in discharging employee had rational basis, was in good faith, and was without abuse of discretion or in violation of procedures required by law. Affirmed Roland Soruill, Petitioner,

v.
MERIT SYSTEMS PROTECTION BOARD, RESPONDENT.
NO. 91-3245.
UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.
Rehearing Denied; Suggestion for Rehearing In Banc Declined
Dec 21,1992

Employee of Department of Veterans Affairs (DVA) petitioned Merit Systems Protection Board (MSPB) for review of his suspension. The MSPB dismissed for lack of subject matter jurisdiction, and employee appealed. The Court of Appeals, Plager, Circuit Judge, held that: (1) proper respondent on appeal was MSPB and not employing agency, and (2) juisdiction of MSPB over statutorily specified whistleblowing activities did not encompass alleged retaliation for employee's filing of discrimination complaint with Equal Employment Opportunity Commission (EEOC). AFFRIMED

§ 7703. Judicial review of decisions of the Merit Systems Protection Board.

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeeding brought pursant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel actionshall be the respondent.

(b) (1) Except as provided in paragragh (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the UNited States Cour of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petitioner received notice of the final order or decision of the Board.

(2) cases fo discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civial Rights Act of 1964 (42 U.S.C. 2000e-16(c)),section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C.633a(c)), and section16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216 (b)), as applicable. Notwithstanding any other provision of law, any such case the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be-

(1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed;or

(3) unsupported by substantial evidence;

except tht in cawse of discrimination brought any section is referred to in subsection (b)(2) of this section, the employee or aplicant shallhave the right to have the faacts subject to trail de novo by the reviewing court.

(d) The Directot of the Office of Personnel Management may obtain review of any order or descision of the Board filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civial service law, rule or regulation affecting personnel management and that the Board's Descision willhave substantial impact on on a civial service law, rule,regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may no petition for review of a Board decision under this section unless the Director firdt petitions the Board for a reconsideration of its decision, and suchpetition is denied. In addition in the named respondent, the Board and all othe parties to the proceedings before thr Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.